IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SECOND APPEAL NO. 132 of 2020
With
CIVIL APPLICATION (FOR STAY) NO. 1 of 2020
In
R/SECOND APPEAL NO. 132 of 2020

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LEGAL HEIRS AND REPRESENTATIVE OF DECD. DAYALBHAI DURLABHBHAI MISTRY
Versus
TANUJA GIRISHKUMAR MISTRY

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Appearance:
MR DHAVAL D VYAS(3225) for the Appellant(s) No. 1,1.1,1.2,1.3,1.4,1.5,1.6,1.7,1.8,2,3
for the Respondent(s) No. 1,2,3,4,5,6

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CORAM: **HONOURABLE MR. JUSTICE BHARGAV D. KARIA**

Date : 24/08/2020

ORAL ORDER

1. Heard learned advocate Mr. Dhaval D. Vyas appearing for the appellants through video conference.

2. This appeal is filed under Section 100 of the Code of Civil Procedure, 1908(for short “the Code”) by the original defendant nos. 1 to 3 challenging the concurrent findings of fact arrived at by both the Courts below in Regular Civil Suit No. 46 of 2006 which was allowed by the judgment and decree dated 19.12.2012 passed by the trial court and confirmed by the judgment and order dated

31.01.2020 passed by the Appellate Court in Regular Civil Appeal No. 4 of 2013.

3. The brief facts of the case giving rise to this appeal are as under:

3.1. The plaintiff - respondent no.1 herein purchased the suit property situated at Tika No.1, City Survey No. 31 admeasuring 10200.79 sq. meters situated at Khumbharwad, Masjid Fadiyu, Tal. Navsari, Dist.: Navsari by registered sale deed in the year 2000. In the year 2006, the suit was filed by the respondent no.1 - plaintiff on the ground that the respondent nos. 1 to 3 - present appellants have encroached upon the suit property and prayed to remove the encroachment made by the appellants.

3.2. The trial Court framed the following twelve issues below Exh. 41, as under:

> *"1. Whether the suit is bad for delay and latches?*
>
> *2. Whether the suit is barred by law of limitation?*
>
> *3. Whether the suit in the present form is not maintainable?*
>
> *4. Whether the suit is on insufficient Court fees? If so, what should be the consequences?*

5. Whether the plaintiff proves that from the heirs and L.R. Of Bhana Nana he purchased property bearing City Survey No.31, City Survey Tikka No.1/6, Muni.House No.376 by registered sale deed, dated 23.11.2000 and has become owner were owner and occupant having boundary marks as narrated at plaint Para-3?

6. Whether plaintiff proves the boundary marks of the property bearing City Survey No.3 as narrated at plaint Para-2?

7. Whether plaintiff proves that they were passing and re-passing through the southern side door from the public road and deft.No.2 in collusion with deft. Nos.1 and 3 by trespassing upon vacant land constructed shed and locked the entrance door of the plaintiff's property and have mad unauthorized construction?

8. Whether defts. Prove that vacant land along with construction bearing City Survey No.31 was never in the possession of the plaintiff or their predecessor-in-title or they were never owners within 12 years prior to the execution of sale-deed in favour of plaintiff and defendants are occupying possession openly, continuously, publicly without any hindrance or objection peaceably within the knowledge of plaintiff and their predecessor-in-title for more than thirty years and have become owners by adverse possession?

9. Whether defendants prove that the plaintiff has falsely stated that the

boundary marks of the property narrated in the plaint?

10. Whether the plaintiff is entitled to get the reliefs of mandatory injunction to get removal of the construction, encroachments made by the defts. nos.1 to 3?

11. Whether plaintiff is entitled to get the mandatory order directing defendants nos.1 to 3 or through Court Commissioner to break open the lock on the southern side door and to remove the hindrance?

12. What order or decree?"

3.3. The Trial Court after considering the oral evidence of the plaintiff at Exh.66 and witness Mr. Ranchhodbhai Maganbhai Patel at Exh.90 and the documentary evidence produced in the form of property card, sale deed and the assessment records of the Navsari Municipality from Exh.48 to Exh.98 led by the plaintiff and after considering the oral evidence of late Dayalbhai Durlabhbhai Mistry at Exh.114, Thakorbhai Kikabhai Mistry at Exh.145 and Jagubhai Kalyanbhai Mistry at Exh.157 together with documentary evidences produced on behalf of the appellants from Exh.61 to Exh. 164, came to the conclusion that the appellants have encroached upon the suit property which is of the ownership of the plaintiff

- respondent no.1 herein.

3.4. The trial Court after considering the oral and documentary evidence came to the conclusion that the plaintiff has proved that from legal heirs of Bhana Nana, the plaintiff purchased the suit property and has become owner and occupant having boundaries marked as narrated in para-3 of the plaint as per the sale deed dated 23.11.2000. The trial Court also came to the conclusion that the plaintiff has proved that the plaintiff was passing through the southern side of the public road and the appellants have trespassed upon the vacant land and constructed shed and blocked the entrance door of the suit property by putting up the unauthorized construction. The trial Court mainly relied upon the documentary evidences produced on record by the plaintiff which clearly shows that the plaintiff is the legal owner of the suit property and the appellants have no right, title or interest over the suit property, more particularly, as per the cross-examination of late Dayalbhai Durlabhbhai Mistry at Exh.114, wherein, he has categorically admitted that the appellants - original defendant nos. 1 to 3 have started using the suit property as the

same was lying vacant and was adjoining to the property of the defendant nos. 1 to 3 situated at Survey No. 30.

3.5. The trial Court also discarded the plea of the appellants with regard to the adverse possession by relying upon the decisions of the Apex Court with regard to the law of adverse possession and on facts has come to the conclusion that there is no adverse possession qua the original plaintiff - respondent no.1 as the plaintiff - respondent no.1 has become the owner of the suit property in the year 2000 and the suit is filed in the year 2006, and therefore, it cannot be said that the respondent - original plaintiff inspite of being aware of the possession of the defendant nos. 1 to 3 - appellants herein, has not remained vigilant to take any action during the period of 12 years which would entitle the defendant nos. 1 to 3 to claim the adverse possession qua the plaintiff.

3.6. The trial Court therefore passed the impugned judgment and decree as prayed for by the plaintiff directing the appellants herein to remove the encroachment and the construction put up on the suit property.

3.7. Being aggrieved by the judgment and decree passed by the trial Court, the appellants preferred Regular Civil Appeal No. 4 of 2013 before the Court of Additional District Judge, Navsari and submitted mainly on the ground that the suit itself was not maintainable, in view of there being no prayer for restoring the possession by the plaintiff and the suit for the injunction is not maintainable. The appellants also prayed for rejection of plaint on the basis of the adverse possession of the suit property.

3.8. The Appellate Court after considering the submissions made by both the sides and, more particularly, after relying upon the cross-examination of late Dayalbhai Durlabhbhai Mistry at Exh.114 and cross-examination of Thakorbhai Kikabhai Mistry at Exh.145 discarded the plea of adverse possession on facts after referring to the various decisions of the Supreme Court laying down the law of adverse possession. The decisions relied upon by both the sides before the Courts below are not referred to and discussed herein, because the same lays down the well established principles of law

of adverse possession which are not applicable in the facts of the present case.

3.9. The Appellate Court therefore by judgment and order dated 31.01.2020 dismissed the appeal on facts, confirming the judgment and decree passed by the trial Court.

3.10. The appellants therefore have preferred this Second Appeal under Section 100 of the Code of Civil Procedure,1908 raising the following substantial questions of law (though it is mentioned as grounds, they are substantial questions of law):

> *"A. Whether a suit for permanent injunction and for removal of construction without claiming recovery of possession from the defendants, was maintainable in law?*
>
> *B. Whether the Courts have erred in appreciating the documentary and oral evidences led by the defendants while decreeing the suit?*
>
> *C. Whether a mandatory permanent injunction can be passed against a defendant who has perfected title by adverse possession?"*

4. Learned advocate Mr. Dhaval Vyas appearing for the appellants submitted that the suit

filed by the respondent no.1 herein was not maintainable, as the respondent no.1 – original plaintiff in the suit for permanent injunction did not pray for putting the plaintiff in possession after removal of alleged encroachment made by the appellants-defendants. He relied upon the decision of the Apex Court in the case of ***Anathula Sudhakar v. P. Buchi Reddy (dead) and others*** reported in ***(2008) 4 SCC 594.***

5. Learned advocate Mr. Vyas submitted that in view of the decision of the Supreme Court in the case of ***Anathula Sudhakar (supra),*** the suit for permanent injunction and removal of encroachment without claiming recovery of the possession from the defendants is not maintainable in law. Mr. Vyas has therefore submitted that substantial questions law arise for consideration of this court.

6. Having heard the learned counsel appearing for the appellant and having gone through the materials on record, the only question that falls for my consideration is whether there are any substantial questions of law involved in this second appeal.

7. In **Govindaraju v. Mariamman** reported in

2005(2) GLH 305, the Supreme Court has explained the true purport and scope of section 100 of the Code as under:

> "11. A perusal of Section 100 of the Code makes it clear that the High Court cannot proceed to hear a Second Appeal without formulating the substantial questions of law involved in the appeal. It reads :-
>
> > "100. Second Appeal (1) Save as otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law.
> >
> > (2) An appeal may lie under this section from an appellate decree passed ex-parte.
> >
> > (3) In an appeal under this section, the memorandum of appeal shall precisely state the substantial question of law involved in the appeal.
> >
> > (4) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.

> (5) The appeal shall be heard on the question so formulated and the respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question:
>
> Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law, not formulated by it, if it is satisfied that the case involves such question."

12. Section 100 provides that the second appeal would lie to the High Court from a decree passed in appeal by any court subordinate to the High Court if the High Court is satisfied that the case "involves a substantial question of law". It further provides that the memorandum of appeal shall precisely state the substantial question of law involved in the appeal and the High Court on being satisfied that the substantial question of law is involved in a case formulate the said question. Sub-section (5) provides that the "appeal shall be heard on the question so formulated". It reserves the liberty with the respondent against whom the appeal was admitted ex-parte and the questions of law had been framed in his absence to argue that the case did not involve the questions of law framed. Proviso to sub-section (5) states that the questions of law framed at the time of admission would not take away or abridge the power of the court to frame any other substantial question of law

which was not formulated earlier, if the court is satisfied that the case involved such additional questions after recording reasons for doing so. It is abundantly clear from the analysis of Section 100 that if the appeal is entertained without framing the substantial questions of law, then it would be illegal and would amount to failure or abdication of the duty cast on the court. The existence of substantial questions of law is the sine qua non for the exercise of jurisdiction under Section 100 of the Code. { Refer to Kshitish Chandra Purkait v. Santosh Kumar Purkait & Ors. [(1997) 5 SCC 438], Panchugopal Barua v. Umesh Chandra Goswami [(1997) 4 SCC 413], Kondiba Dagadu Kadam v. Savitribai Sopan Gujar [(1999) 3 SCC 722] }

13. A three Judge Bench of this Court in Santosh Hazari v. Purushottam Tiwari (Deceased) By LRs. [(2001) 3 SCC 179] after tracing the history of Section 100, the purpose which necessitated and persuaded the Law Commission of India to recommend for amendment of Section 100, concluded that scope of hearing of Second Appeal by the High Court is circumscribed by the questions formulated by the High Court at the time of admission of the appeal and the High Court has to hear the appeal on substantial questions of law involved in the case only. That the High Court would be at liberty to hear the appeal on any other substantial question of law, not earlier formulated by it, if the court is satisfied of two conditions i.e. (i) the High Court feels satisfied that the case involves such question, and (ii) the High Court records reasons for its

such satisfaction." It was observed in para 10 as under :-

> "At the very outset we may point out that the memo of second appeal filed by the plaintiff-appellant before the High Court suffered from a serious infirmity. Section 100 of the Code, as amended in 1976, restricts the jurisdiction of the High Court to hear a second appeal only on "substantial question of law involved in the case". An obligation is cast on the appellant to precisely state in the memorandum of appeal the substantial question of law involved in the appeal and which the appellant proposes to urge before the High Court. The High Court must be satisfied that a substantial question of law is involved in the case and such question has then to be formulated by the High Court. Such questions or question may be the one proposed by the appellant or may be any other question which though not proposed by the appellant yet in the opinion of the High Court arises as involved in the case and is substantial in nature. At the hearing of the appeal, the scope of hearing is circumscribed by the question so formulated by the High Court. The respondent is at liberty to show that the question formulated by the High Court was not involved in the case. In spite of a substantial question of law determining the scope of hearing of second appeal having been formulated by the High Court, its power to hear the appeal on any other substantial question of

> law, not earlier formulated by it, is not taken away subject to the twin conditions being satisfied : (i) the High Court feels satisfied that the case involves such question, and (ii) the High Court records reasons for its such satisfaction." {Emphasis supplied}

14. As to which would constitute a substantial question of law, it was observed:-

> "A point of law which admits of no two opinions may be a proposition of law but cannot be a substantial question of law. To be "substantial" a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, insofar as the rights of the parties before it are concerned. To be a question of law "involving in the case" there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. An entirely new point raised for the first time before the High Court is not a question involved in the case unless it goes to the root of the matter. It will, therefore, depend on the facts and circumstance of each case whether a question of law is a substantial one and involved in the case, or not; the paramount

> overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any lis." {Emphasis supplied}

15. This judgment has been followed in a number of decisions including the latest on the point Thiagarajan & Ors. v. Sri Venugopalaswamay B. Koil & Ors. [(2004) 5 SCC 762].

16. As per settled law, the scope of exercise of the jurisdiction by the High Court in Second Appeal under Section 100 is limited to the substantial questions of law framed at the time of admission of the appeal or additional substantial questions of law framed at a later date after recording reasons for the same. It was observed in Santosh Hazari's case (supra) that a point of law which admits of no two opinions may be a proposition of law but cannot be a substantial question of law. To be a 'substantial' question of law must be debatable, not previously settled by law of the land or a binding precedent and answer to the same will have a material bearing as to the rights of the parties before the Court. As to what would be the question of law "involving in the case", it was observed that to be a question of law 'involving in the case' there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by the court of facts and it must be necessary to decide that question of law for a just and proper

decision between the parties."

8. In **Union of India v. Ibrahim Uddin & Anr.**, 2012 (8) SCC 148, the Supreme Court, once again, explained the scope of section 100 of the Code as under:

"59. section 100 CPC provides for a second appeal only on the substantial question of law. Generally, a Second Appeal does not lie on question of facts or of law. In State Bank of India & Ors. v. S.N. Goyal, AIR 2008 SC 2594, this Court explained the terms "substantial question of law" and observed as under :

> "The word 'substantial' prefixed to 'question of law' does not refer to the stakes involved in the case, nor intended to refer only to questions of law of general importance, but refers to impact or effect of the question of law on the decision in the lis between the parties. 'Substantial questions of law' means not only substantial questions of law of general importance, but also substantial question of law arising in a case as between the parties. ..... any question of law which affects the final decision in a case is a substantial question of law as between the parties. A question of law which arises incidentally or collaterally, having no bearing on the final outcome, will not be a substantial question of law.

> There cannot, therefore, be a straitjacket definition as to when a substantial question of law arises in a case." (Emphasis added)

60. Similarly, in Sir Chunilal V. Mehta & Sons Ltd. v. Century Spinning and Manufacturing Co. Ltd., AIR 1962 SC 1314, this Court for the purpose of determining the issue held:-

> "The proper test for determining whether a question of law raises in the case is substantial, would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties....." (Emphasis added)

61. In Vijay Kumar Talwar v. Commissioner of Income Tax, New Delhi, (2011) 1 SCC 673, this Court held that,

> "21...14. A point of law which admits of no two opinions may be a proposition of law but cannot be a substantial question of law. To be 'substantial' a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material on the decision of the case, if answered either way, insofar as the rights of the parties before it are concerned. To be a question of law 'involving in the case' there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable

> findings of fact arrived at by court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. It will, therefore, depend on the facts and circumstance of each case, whether a question of law is a substantial one or not; the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any lis." (See also: Rajeshwari v. Puran Indoria, (2005) 7 SCC 60).

62. The Court, for the reasons to be recorded, may also entertain a second appeal even on any other substantial question of law, not formulated by it, if the Court is satisfied that the case involves such a question. Therefore, the existence of a substantial question of law is a sine-qua-non for the exercise of jurisdiction under the provisions of section 100 CPC. The second appeal does not lie on the ground of erroneous findings of facts based on appreciation of the relevant evidence.

63. There may be a question, which may be a "question of fact", "question of law", "mixed question of fact and law" and "substantial question of law." Question means anything inquired; an issue to be decided. The "question of fact" is whether a particular factual situation exists or not. A question of fact, in the Realm of Jurisprudence, has been explained as under:-

> "A question of fact is one capable of being answered by way of demonstration. A question of opinion is one that cannot be so answered. An answer to it is a matter of speculation which cannot be proved by any available evidence to be right or wrong." (Vide: Salmond, on Jurisprudence, 12th Edn. page 69, cited in Gadakh Yashwantrao Kankarrao v. E.V. alias Balasaheb Vikhe Patil & ors., AIR 1994 SC 678).

64. In Smt. Bibhabati Devi v. Ramendra Narayan Roy & Ors., AIR 1947 PC 19, the Privy Council has provided the guidelines as in what cases the second appeal can be entertained, explaining the provisions existing prior to the amendment of 1976, observing as under:-

> "(4)..... that miscarriage of justice means such a departure from the rules which permeate all judicial procedure as to make that which happen not in the proper sense of the word 'judicial procedure' at all. That the violation of some principles of law or procedure must be such erroneous proposition of law that if that proposition to be corrected, the finding cannot stand, or it may be the neglect of some principle of law or procedure, whose application will have the same effect. The question whether there is evidence on which the Courts could arrive at their finding, is such a question of law.

> (5) 'That the question of admissibility of evidence is a proposition of law but it must be such as to affect materially the finding. The question of the value of evidence is not sufficient reason for departure from the practise....."

65. In Suwalal Chhogalal v. Commissioner of Income Tax, (1949) 17 ITR 269, this Court held as under:-

> "A fact is a fact irrespective of evidence, by which it is proved. The only time a question of law can arise in such a case is when it is alleged that there is no material on which the conclusion can be based or no sufficient material."

66. In Oriental Investment Company Ltd. v. Commissioner of Income Tax, Bombay, AIR 1957 SC 852, this Court considered a large number of its earlier judgments, including Sree Meenakshi Mills Ltd., Madurai v. Commissioner of Income Tax, Madras, AIR 1957 SC 49, and held that where the question of decision is whether certain profit is made and shown in the name of certain intermediaries, were, in fact, profit actually earned by the assessee or the intermediaries, is a mixed question of fact and law. The Court further held that

> “29... inference from facts would be a question of fact or of law according as the point for determination is one of pure fact or

> a "mixed question of law and fact" and that a finding of fact without evidence to support it or if based on relevant or irrelevant matters, is not unassailable."

67. There is no prohibition to entertain a second appeal even on question of fact provided the Court is satisfied that the findings of the courts below were vitiated by non-consideration of relevant evidence or by showing erroneous approach to the matter and findings recorded in the court below are perverse. (Vide: Jagdish Singh v. Nathu Singh, AIR 1992 SC 1604; Smt. Prativa Devi (Smt.) v. T.V. Krishnan, (1996) 5 SCC 353; Satya Gupta (Smt.) @ Madhu Gupta v. Brijesh Kumar, (1998) 6 SCC 423; Ragavendra Kumar v. Firm Prem Machinary & Co., AIR 2000 SC 534; Molar Mal (dead) through Lrs. v. M/s. Kay Iron Works Pvt. Ltd., AIR 2000 SC 1261; Bharatha Matha & Anr. v. R. Vijaya Renganathan & Ors., AIR 2010 SC 2685; and Dinesh Kumar v. Yusuf Ali, (2010) 12 SCC 740).

68. In Jai Singh v. Shakuntala, AIR 2002 SC 1428, this Court held that it is permissible to interfere even on question of fact but it may be only in "very exceptional cases and on extreme perversity that the authority to examine the same in extenso stands permissible it is a rarity rather than a regularity and thus in fine it can thus be safely concluded that while there is no prohibition as such, but the power to scrutiny can only be had in very exceptional circumstances and upon proper circumspection." Similar view has

been taken in the case of Kashmir Singh v. Harnam Singh & Anr., AIR 2008 SC 1749.

69. Declaration of relief is always discretionary. If the discretion is not exercised by the lower court "in the spirit of the statute or fairly or honestly or according to the rules of reason and justice", the order passed by the lower court can be reversed by the superior court. (See: Mysore State Road Transport Corporation v. Mirja Khasim Ali Beg & Anr., AIR 1977 SC 747).

70. There may be exceptional circumstances where the High Court is compelled to interfere, notwithstanding the limitation imposed by the wording of section 100 CPC. It may be necessary to do so for the reason that after all the purpose of the establishment of courts of justice is to render justice between the parties, though the High Court is bound to act with circumspection while exercising such jurisdiction. In second appeal the court frames the substantial question of law at the time of admission of the appeal and the Court is required to answer all the said questions unless the appeal is finally decided on one or two of those questions or the court comes to the conclusion that the question(s) framed could not be the substantial question(s) of law. There is no prohibition in law to frame the additional substantial question of law if the need so arises at the time of the final hearing of the appeal. "

9. In the case of **Syeda Rahimunnisa v. Malan Bi (Dead) by Legal Representatives & Anr.**, 2016 (10) SCC 315, the Supreme Court has reiterated the scope of section 100 of the Code and the principles of law, governing the second appeal, has been explained in detail as under:

> "24. The scope of section 100 of CPC while deciding the second appeal by the High Court has been the subject matter of several decisions of this Court and thus remains no more res integra. A reference to the two cases on this question would suffice.
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> 25. A three-judge Bench of this Court in the case of Santosh Hazari v. Purushottam Tiwari (Deceased) by LRs. reported in (2001) 3 SCC 179 speaking through R.C. Lahoti J (as His Lordship then was) examined the scope of section 100 of CPC in detail and laid down the following propositions in paragraphs 9, 10, 12 and 14 as under:
>
> > "9. The High Court cannot proceed to hear a second appeal without formulating the substantial question of law involved in the appeal and if it does so it acts illegally and in abnegation or abdication of the duty cast on Court. The existence of substantial question of law is the sine qua non for the exercise of the jurisdiction under the amended Section 100 of the Code. (See Kshitish Chandra Purkait v. Santosh

Kumar Purkait (1997) 5 SCC 438, Panchugopal Barua v. Umesh Chandra Goswami (1997) 4 SCC 413 and Kondiba Dagadu Kadam v. Savitribai Sopan Gujar (1999) 3 SCC 722).

10. At the very outset we may point out that the memo of second appeal filed by the plaintiff-appellant before the High Court suffered from a serious infirmity. Section 100 of the Code, as amended in 1976, restricts the jurisdiction of the High Court to hear a second appeal only on "substantial question of law involved in the case". An obligation is cast on the appellant to precisely state in the memorandum of appeal the substantial question of law involved in the appeal and which the appellant proposes to urge before the High Court. The High Court must be satisfied that a substantial question of law is involved in the case and such question has then to be formulated by the High Court. Such questions or question may be the one proposed by the appellant or may be any other question which though not proposed by the appellant yet in the opinion of the High Court arises as involved in the case and is substantial in nature. At the hearing of the appeal, the scope of hearing is circumscribed by the question so formulated by the High Court. The respondent is at liberty to show that the question formulated by the High Court was not involved in the case In spite of a substantial question of law determining the scope of hearing of second appeal

having been formulated by the High Court, its power to hear the appeal on any other substantial question of law, not earlier formulated by it, is not taken away subject to the twin conditions being satisfied: (i) the High Court feels satisfied that the case involves such question, and (ii) the High Court records reasons for its such satisfaction.

12. The phrase "substantial question of law", as occurring in the amended Section 100 is not defined in the Code. The word substantial, as qualifying "question of law", means - of having substance, essential, real, of sound worth, important or considerable. It is to be understood as something in contradistinction with - technical, of no substance or consequence, or academic merely. However, it is clear that the legislature has chosen not to qualify the scope of "substantial question of law" by suffixing the words "of general importance" as has been done in many other provisions such as Section 109 of the Code or Article 133(1)(a) of the Constitution. The substantial question of law on which a second appeal shall be heard need not necessarily be a substantial question of law of general importance. In Guran Ditta v. T. Ram Ditta (AIR 1928 PC 172), the phrase "substantial question of law" as it was employed in the last clause of the then existing section 110 CPC (since omitted by the Amendment Act, 1973) came up for consideration and their Lordships held that it did not

mean a substantial question of general importance but a substantial question of law which was involved in the case as between the parties. In Sir Chunilal v. Mehta & Sons Ltd. v. Century Spg. and Mfg. Co. Ltd. (AIR 1962 SC 1314) the Constitution Bench expressed agreement with the following view taken by a Full Bench of the Madras High Court in Rimmalapudi Subba Rao v. Noony Veeraju (AIR 1951 Mad 969):

> "When a question of law is fairly arguable, where there is room for difference of opinion on it or where the Court thought it necessary to deal with that question at some length and discuss alternative views, then the question would be a substantial question of law. On the other hand if the question was practically covered by the decision of the highest court or if the general principles to be applied in determining the question are well settled and the only question was of applying those principles to the particular facts of the case it would not be a substantial question of law."

and laid down the following test as proper test, for determining whether a question of law raised in the case is substantial:

> "The proper test for determining whether a question of law raised

> in the case is substantial would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of law."

14. A point of law which admits of no two opinions may be a proposition of law but cannot be a substantial question of law. To be "substantial" a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, insofar as the rights of the parties before it are concerned. To be a question of law "involving in the case" there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by court of facts and it must be necessary to decide

> that question of law for a just and proper decision of the case. An entirely new point raised for the first time before the High Court is not a question involved in the case unless it goes to the root of the matter. It will, therefore, depend on the facts and circumstance of each case whether a question of law is a substantial one and involved in the case, or not; the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any lis".

26. Again in the case of Thiagarajan And Others v. Sri Venugopalaswamy B. Koil And Others reported in 2004 (5) SCC 762, a two Judge Bench of this Court in paragraphs 17, 24, 25 and 26 observed as under:

> "17. Sub-section (5) of section 100 CPC says that the appeal shall be heard on the question so formulated and the respondent shall at the hearing of the appeal be allowed to argue that the case does not involve such a question. The proviso states that nothing in this subsection shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law not formulated by it if it is satisfied that the case involves such question. In the instant case, the High Court at the

time of final hearing formulated five more questions of law as extracted above after hearing the counsel for both sides having miserably failed to record the reasons for formulating the other substantial questions of law.

24. In our opinion, the High Court has erred in holding that the appellants have failed to establish their title to the suit property evidently without appreciating the evidence on record in its proper perspective by making only reference to portions of evidence having once decided to re appreciate the evidence. The High Court, in our opinion, ought to have examined the entire evidence both oral and documentary instead of only a portion thereof especially while deciding to look into and re appreciate the evidence despite the limited scope under section 100 CPC. In our view, the learned Single Judge of the High Court has exceeded his jurisdiction in reassessing, re appreciating and making a roving enquiry by entering into the factual arena of the case which is not the one contemplated under the limited scope of jurisdiction of a second appeal under section 100 CPC.

25. In the present case, the lower appellate court fairly appreciated the evidence and arrived at a conclusion that the appellants' suit was to be decreed and that the appellants are entitled to the relief as prayed for. Even assuming

> that another view is possible on a reappreciation of the same evidence, that should not have been done by the High Court as it cannot be said that the view taken by the first appellate court was based on no material.
>
> 26. To say the least the approach of the High Court was not proper. It is the obligation of the courts of law to further the clear intendment of the legislature and not frustrate it by excluding the same. This Court in a catena of decisions held that where findings of fact by the lower appellate court are based on evidence, the High Court in second appeal cannot substitute its own findings on reappreciation of evidence merely on the ground that another view was possible". "

10. As pointed out above that the respondent no.1 -plaintiff filed suit for permanent injunction claiming to be the registered owner of the suit land with a prayer to direct the defendants to remove unauthorised encroachment and both the courts below have arrived at concurrent findings of fact that the respondent no.1-plaintiff purchased the suit land by registered sale deed in the year 2000 and as such was the owner and occupier of the suit land and the appellants-defendants nos. 1 to 3 have unlawfully

encroached upon the suit land. Both the courts also discarded the plea of adverse possession raised by the appellants on the facts of the case. There is categorical admission of the defendants that they are not the owners of the suit land and they were using the same as it was adjacent to their land. The learned counsel for the appellants was not in position to explain the right to have possession of the suit land by the appellants in any manner. He also could not substantiate plea of adverse possession in view of undisputed concurrent findings of the fact arrived at by both the courts below to the effect that plaintiff was vigilant for the ownership rights and on coming to know about the encroachment made by the appellants on the suit land, the suit for permanent injunction was filed in the year 2006. It is the case of the respondent no.1 -plaintiff that he was the owner of the suit land and the prayer is only to remove the encroachment made by the appellants and to grant permanent injunction against peaceful possession of the suit land.

11. In the facts of the case, it is not possible to take the view as a proposition of law that a mere suit for permanent injunction will not lie or is per se not maintainable in

law in the absence of any specific prayer for declaration as the respondent no.1- plaintiff was in lawful or peaceful possession of suit land and such possession was interfered or threatened by the appellants-defendants nos. 1 to 3, a suit for an injunction simpliiter was maintainable. A person has a right to protect his possession against any person who does not prove a better title by seeking a prohibitory injunction. But a person in wrongful possession is not entitled to an injunction against the rightful owner. Where the title of the plaintiff is not disputed, but he is not in possession, his remedy is to file a suit for possession and seek in addition, if necessary, an injunction. A person out of possession, cannot seek the relief of injunction simpliciter, without claiming the relief of possession. Where the plaintiff is in possession, but his title to the property is in dispute, or under a cloud, or where the defendant asserts title thereto and there is also a threat of dispossession from the defendant, the plaintiff will have to sue for declaration of title and the consequential relief of injunction. Where the title of the plaintiff is under a cloud or in dispute and he is not in possession or not able to establish possession, necessarily the

plaintiff will have to file a suit for declaration, possession and injunction.

12. So far as the case in hand is concerned, both the courts have concurrently recorded a finding of fact that the respondent no.1-plaintiff was able to establish his rightful ownership of the suit land and defendants failed to establish any right to have possession of the suit land. In the aforesaid context, reliance placed by the learned advocate for the appellants upon a decision of the Supreme Court in the case of Anathula Sudhakar v. P. Buchi Reddy (Dead) by Lrs. & Ors. (supra) wherein four questions arose for consideration which are stated in para-12 as extracted hereunder;

> "12. On the contentions urged, the following questions arise for our consideration in this appeal:
>
> (i) What is the scope of a suit for prohibitory injunction relating to immovable property?
>
> (ii) Whether on the facts, plaintiffs ought to have filed a suit for declaration of title and injunction ?
>
> (iii) Whether the High Court, in a

second appeal under section 100 CPC, examine the factual question of title which was not the subject matter of any issue and based on a finding thereon, reverse the decision of the first appellate court?

(iv) What is the appropriate decision?

In para-21, the Supreme Court has summarised the possession in regard to the suits for prohibitory injunction relating to the immovable property. Para-21 is extracted hereunder;

"(a) Where a cloud is raised over plaintiff's title and he does not have possession, a suit for declaration and possession, with or without a consequential injunction, is the remedy. Where the plaintiff's title is not in dispute or under a cloud, but he is out of possession, he has to sue for possession with a consequential injunction. Where there is merely an interference with plaintiff's lawful possession or threat of dispossession, it is sufficient to sue for an injunction simpliciter.

(b) As a suit for injunction simpliciter is concerned only with possession, normally the issue of title will not be directly and substantially in issue. The prayer for injunction will be decided with reference to the finding on

possession. But in cases where de jure possession has to be established on the basis of title to the property, as in the case of vacant sites, the issue of title may directly and substantially arise for consideration, as without a finding thereon, it will not be possible to decide the issue of possession.

(c) But a finding on title cannot be recorded in a suit for injunction, unless there are necessary pleadings and appropriate issue regarding title [either specific, or implied as noticed in Annaimuthu Thevar (supra)]. Where the averments regarding title are absent in a plaint and where there is no issue relating to title, the court will not investigate or examine or render a finding on a question of title, in a suit for injunction. Even where there are necessary pleadings and issue, if the matter involves complicated questions of fact and law relating to title, the court will relegate the parties to the remedy by way of comprehensive suit for declaration of title, instead of deciding the issue in a suit for mere injunction.

(d) Where there are necessary pleadings regarding title, and appropriate issue relating to title on which parties lead evidence, if the matter involved is simple and straight-forward, the court may decide upon the issue regarding title, even in a suit for injunction. But such cases, are the

> exception to the normal rule that question of title will not be decided in suits for injunction. But persons having clear title and possession suing for injunction, should not be driven to the costlier and more cumbersome remedy of a suit for declaration, merely because some meddler vexatiously or wrongfully makes a claim or tries to encroach upon his property. The court should use its discretion carefully to identify cases where it will enquire into title and cases where it will refer to plaintiff to a more comprehensive declaratory suit, depending upon the facts of the case."

In para-31, while allowing the appeal and quashing and setting aside the judgment and order of the High Court, the Supreme Court said something on the scope of section 100 of the Code as under:

> "31. We are therefore of the view that the High Court exceeded its jurisdiction under section 100 CPC, firstly in re-examining questions of fact, secondly by going into the questions which were not pleaded and which were not the subject matter of any issue, thirdly by formulating questions of law which did not arise in the second appeal, and lastly, by interfering with the well reasoned judgment of the first appellate court which held that the plaintiffs ought to have filed a suit for declaration."

13. In view of concurrent findings of fact and settled legal position the aforementioned proposed substantial questions cannot be regarded as satisfying the test of being "substantial questions of law" within the meaning of section 100 of the Code. These questions are essentially questions of fact or at best mixed questions of law and fact. In any event, this second appeal does not involve any substantial question of law as contemplated under section 100 of the Code for the following reasons:

(i) The Trial Court and the first Appellate Court, on appreciation of the evidence has concurrently held that the appellants-defendants nos. 1 to 3 have failed to prove any right, title or interest over the suit land on the basis of any document and when there is admission in cross examination of the appellants that they were using the suit land as it was adjacent to their land and as there is merely an interference with plaintiff's lawful possession, it is sufficient to sue for an injunction simpliciter, therefore, such findings cannot be interfered with being concurrent in nature.

(ii) Moreover, none of the findings of the two courts below could be termed as perverse to the extent that no judicial person could ever come to such conclusion and the findings recorded by the two courts below are not in conflict with any provision of law governing the issues and that the findings are also not against the pleadings or evidence. Therefore, the findings of fact recorded by the two courts below are not capable of being set aside by this Court in exercise of its second appellate jurisdiction under section 100 of the Code.

(iii) Apart from what is held above, the questions formulated are neither debatable nor arguable and nor sine qua non for admitting the second appeal as "substantial question of law in the case".

14. In view of the foregoing reasons, no question of law much less any substantial question of law arise from the impugned judgment and order passed by both the Courts below, and therefore, the appeal fails and is summarily dismissed with no order as to costs.

(BHARGAV D. KARIA, J)

RAGHUNATH R NAIR